It is further interesting to note the emphasis the Petitioner places on his interpretation of the *Spevack* case. The *Spevack* case was decided on January 17, 1967, some five months *before* the decision in this case. When the Petitioner's decision came down he had ample opportunity to test these interpretations by way of appeal, rather than his now belated attempt for writ of error *coram nobis.*

Petitioner further contends that he was denied the right under the Sixth Amendment of the Constitution of the United States to be confronted with witnesses against him. He states that notwithstanding his stipulation, made on October 3, 1966 in open court, his right of confrontation was violated in that *he* was not present during the presentation of his own case and during the testimony of the rebuttal witnesses. His theory is that due to his critical illness he was forced to stipulate to the procedure followed and had no choice other than to agree to the stipulation.

With this contention we cannot agree. The record shows that on October 3, 1966 Petitioner was present in open court with counsel and submitted at that time a sixty page statement to the Trial Judge, together with letters from three physicians. This, by stipulation (page 17 of Petitioner's brief), was to be allowed in evidence without cross-examination but subject to review and possible rebuttal by the Judicial Inquiry. On October 19, 1966 pursuant to an agreement with Petitioner's counsel, Respondent produced three witnesses for rebuttal testimony, which witnesses, although Petitioner himself was not physically in court, were cross-examined by Petitioner's counsel.

All of the foregoing clearly appears in the record and at no time was an objection made by either the Petitioner, himself an attorney, or his counsel. Further, the Trial Judge was fully aware at that time of Petitioner's medical

condition, as the record is replete with letters from physicians and, more important, an exhaustive history from Petitioner himself as to his present medical condition. Matters of record cannot be made basis of relief by coram nobis (*People* v. *Allen*, 18 A.D. 2d 840).

As stated in *People* v. *Howard*, 12 N.Y. 2d 65:

> "**** Consequently, since the defendant did have an attorney upon the trial who could have objected to the use of the statement and could thereby have fully protected his rights, he had counsel in ample time to raise the question of a defect in the earlier part of the proceedings (citing cases)."

An innuendo is also apparent in Petitioner's brief that the lower court abused its discretion in not granting the Petitioner an adjournment in view of his medical condition. We respectfully refer the Court to *People* v. *Guber*, 201 Misc. 852, 113 N.Y.S. 2d 192, affd. 1 A.D. 2d 876, 150 N.Y.S. 2d 543, wherein it was held that the failure to grant a continuance in the State of New York was a matter for appeal and not of coram nobis.

All of the alleged violations of constitutional rights posed on this appeal appear in the trial record and the Petitioner is, therefore, not in a position to invoke the common law writ of coram nobis. In such circumstances the Petitioner is relegated to remedies afforded by way of appeal (*Matter of Hogan* v. *Court of General Sessions, New York County*, 296 N.Y. 1; *People* v. *Sadness*, 300 N.Y. 69; *People* v. *Howard*, 12 N.Y. 2d 65; *People* v. *Kendricks*, 300 N.Y. 544).

It is therefore submitted that Petitioner's rights under the Fourth and Fifth Amendments, were, as a matter of law, not violated and that there was ample evidence in the record that Petitioner's Sixth Amendment right of confrontation was, by stipulation, either available to him or effectively waived.

CONCLUSION

The petition for the granting of a writ of certiorari should be denied.

Respectfully submitted,

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